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IN THE

Supreme Court of the United States

October Term 1971

No. 71-1480

FERRIS JACOB ALEXANDER
Petitioner

vs.

UNITED STATES OF AMERICA

REPLY BRIEF OF PETITIONER

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The Government's memorandum in opposition distorts both fact and logic in its attempt to sustain the rulings below.

The trial court's finding of no conflict of interest on the record (Pet. 11) is not a basis to deny appellant's petition without a hearing. Petitioner alleged that a hearing would reveal his attorney Fahringer's divided loyalty. (App. 5) Fahringer submitted no affidavit upon which the Court could make a finding contrary to the allegations of the petitioner. The trial court went outside of the record to make its ruling. Fahringer represented four co-defendants Max Bornstein, Paul Wolf, Edward Alexander and Ferris Alexander prior to

the trial of petitioner. The extent of Fahringer's representation of Bornstein, Wolf and Edward Alexander could not be determined from the record. An attorney does more than merely attend Court proceedings and file pleadings which make up the record. In addition, an attorney engages in an attorney-client relationship where the client discloses to the attorney privileged statements concerning his involvement with the case and his relationships with co-defendants and possible witnesses. An attorney and his client discuss trial strategy prior to the trial. An attorney agrees to defend the client, giving him his undivided loyalty and exerting his best efforts in securing the client's acquittal. These out of court conferences are not part of the record.

The record could not disclose the loyalties which existed between Fahringer and his four clients while Fahringer was a counsel for Ferris Alexander during the trial.

The trial judge ruled (Pet. 11) the files and records demonstrate that Mr. Fahringer did not represent petitioner in any real sense until he had ceased to represent other defendants.

The files and records do not show that Fahringer ever ceased to represent the other defendants.

The only defendant Fahringer ceased to represent prior to the trial was Max Bornstein. (App. 23). But even as to Max Bornstein the record does not disclose Fahringer abandoned his loyalties to Max Bornstein. The record does not disclose that Fahringer was relieved from his duties to Paul Wolf. The trial court and government assume Fahringer severed his duties to Wolf although no Court order discharged Fahringer and no affidavit of either Fahringer or Wolf supports this allegation.

The record discloses that Fahringer represented Edward Alexander during the time of Ferris Alexander's trial. Foot-

note 2 of the Government's memorandum in opposition at page 3 states, "The indictment against Edward Alexander was subsequently dismissed." The government neglected to add that the dismissal of Edward was on the motion of Fahringer filed several months after Ferris Alexande s trial. The Government knows Fahringer was Edward Alexander's attorney at the time of the trial, yet it distorts the record to deceive this court and claims that Fahringer ceased to represent other defendants before the trial. The record does not disclose that Fahringer did not have a divided loyalty. Fahringer filed no affidavit in these proceedings.

Although the fact of Fahringer's past representations was not hidden from petitioner, the consequences of his divided loyalty were unknown to petitioner. (App. 4). Petitioner did not know of the inability of the Government's witness to identify him from his brother Edward Alexander. Mere knowledge of the facts does not constitute a waiver. Waiver of a constitutional right to effective assistance of counsel requires an informed, knowing, intelligent appreciation of the legal consequences. Petitioner did not know Fahringer's judgment would be affected by his other loyalties (App. 17). Petitioner did not know that Fahringer's dual allegiance would prevent petitioner from calling witnesses or testifying. (App. 12).

The government's memorandum misstates petitioner's contention (p. 2). Petitioner does not contend that he was denied effective representation of counsel because prior to trial one of his attorneys had represented co-defendants. Petitioner contends that *during* his trial his attorney's allegiance to co-defendants caused by his current and past representations deprived him of effective assistance of council. (App. 17).

At the trial, petitioner was represented by one attorney, Fahringer, who was assisted by this writer. (App. 15). No

affidavit was submitted by the government or Fahringer to show that Fahringer was not solely and primarily in charge of petitioner's trial. The record shows no part in the trial played by this writer. Fahringer's inability to give petitioner his unhindered judgment in conducting the trial was not made known to petitioner or to this writer because it was not revealed by Fahringer or inquired into by the trial court. Fahringer's basic conflict of protecting Edward Alexander at the expense of petitioner could not have been foreseen by anyone but the government. The government did not disclose its witness's inability to identify petitioner from Edward until the evening before the witness testified, when the Grand Jury testimony was supplied to Fahringer. By this time the case against petitioner was almost closed. Not until then could Fahringer realize he could save petitioner by implicating Edward. Fahringer, however, never disclosed his divided loyalty could interfere with his decision not to call Edward Alexander as a witness and to recommend to Ferris Alexander not to testify. (App. 17). The petitioner was never advised of the consequences of allowing Fahringer to represent him which would result from Fahringer's divided loyalties and could not know that Fahringer's advice was not given solely for petitioner's benefit. Petitioner was precluded from effectively raising the defense of misidentification because his attorney also represented a severed co-defendant and the government did not disclose the witness's confusion in identification prior to trial but instead caused the severance.

The guarantee every citizen has to a fair trial is assured by an advocate who is independent of a duty to protect any person other than his client. Our Courts, too, must be vigilant to protect every accused's right to an effective attorney, unhindered by dual allegiance.

If a trial court is indifferent to these most precious rights symbolized by this case all of our rights are imperiled. History has taught us that our rights are not self-enforcing and they must be scrupulously protected by our Courts or else they will wane.

Respectfully submitted,

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